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TRUSTS — MISAPPROPRIATION BY THE TRUSTEE — LIABILITY. — A defaulting trustee of P. trust, wrongfully sold corporate stock of N. trust, of which he was also trustee, and used the proceeds to pay the debts of P. trust and the income due its beneficiaries. The beneficiaries of P. trust had no knowledge of the larceny. In a suit by the surviving trustee and beneficiaries of N. trust against the trustee and beneficiaries of P. trust to recover the value of the stock, *held*, (KNOWLTON, C. J., dissenting) that the beneficiaries were liable for the money used in the payment of the debts but not for that part received as their income. *Newell et al.* v. *Hadley et al.* (1910), — Mass. —, 92 N. E. 507.

All the judges were agreed that the beneficiaries were not liable for the amount that they received as income because they acted for themselves and were bona fide purchasers. A creditor who receives trust funds from his debtor, in payment on a debt, not knowing of the trust, is not implicated in his debtor's breach of trust. *Bailey* v. *Colton*, 25 S. C. 436; *First Nat. Bank* v. *City Nat. Bank*, 102 Mo. App. 357, 76 S. W. 489; *Holly* v. *Missionary Soc.*, 180 U. S. 284. *Stephens* v. *Board of Education*, 79 N. Y. 183, 35 Am. Rep. 511. But on the question whether the beneficiaries were liable for the part of the money used in the payment of the debts the court was divided. There does not seem to be any doubt that the plaintiffs could not maintain an action at law, for the payment by one for the benefit of another without any request from that other does not create any legal obligation. *Contoocook Fire Precinct* v. *Hopkinton*, 71 N. H. 574; *Bryant* v. *Nelson-Frey Co.*, 94 Minn. 305, 102 N. W. 859; *City of Chicago* v. *Chic. Ry.*, 186 Ill. 300. It is equally well settled in equity that one who advances money to pay the debt of another in the absence of agreement, express or implied, will not be entitled to succeed to the rights of the creditor unless there is an obligation or a right, legal or equitable, on the part of such person in respect to the matter concerning which the advances are made. 21 AM. & ENG. ENCY. LAW, Ed. 2, p. 255; *Koehler* v. *Hughes*, 148 N. Y. 507; *Martin* v. *Martin*, 164 Ill. 640, 56 Am. St. Rep. 219. In England however, it is held that in the case of the money of one person having been used in the extinguishment of the liabilities of another the former may enforce against the latter the obligation of the latter's creditors paid off by the former's money, though no obligation is thereby created by law. *Bannatyne* v. *MacIver*, [1906] 1 K. B. 103; *In re Wrexam Ry.* [1899] 1 Ch. 205. This rule is followed by the majority in the principal case. The same principle seems to have been recognized in *Cotton* v. *Dacey*, 61 Fed. 481 and in *Markillie* v. *Allen*, 120 Mich. 360, 79 N. W. 568. The majority also maintain that if it is to be considered that the trustee did not pay the creditors directly but that he undertook to pay his debt to the defendants and then to have used that money in paying the defendants' debts the defendants are still liable because the money was received for them by the thief himself, and being chargeable with his knowledge, they got no better title than the thief had. *Brannon* v. *May*, 42 Ind. 92; *Hunter* v. *Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Orme* v. *Baker*, 74 Ohio St. 337, 78 N. E. 439. The dissenting opinion holds that the beneficiaries are bona fide purchasers both as regards the income and the money used in the

payment of the debts. In the view of the Chief Justice the defendants were not chargeable with the knowledge of the trustee because he was in the midst of a course of embezzlement from them and the payments were made in his own interest to prevent the discovery of his crime. *Case* v. *Hammond Packing Co.,* 105 Mo. App. 168, 79 S. W. 732; *Arey* v. *Hall,* 81 Me. 17, 16 Atl. 302, 10 Am. St. Rep. 232; *Spooner* v. *Thompson,* 48 Vt. 259; *Eggleston* v. *Mason,* 84 Ia. 630, 54 N. W. 1.

WASTE—NO PHYSICAL INJURY TO PREMISES.—Action of tort in the nature of waste by the mortgagee of certain real estate against the tenants. The tenants, acting as members of a board of health, leased the premises of the mortgagor, the same to be used as a hospital for smallpox patients. Plaintiff did not know of the lease, nor of its occupation by the defendants until after it had continued for several months. *Held,* plaintiff could recover any material diminution in the value of his property, which was a question for the jury to decide, having in view all the facts, the effect of such use upon its future rental value, etc., but excluding all sentimental or fanciful notions affecting only its reputation. *Delano* v. *Smith et al.* (1910), — Mass. —, 92 N. E. 500.

This case presents a very good illustration of the manner in which the ancient idea of waste has given way under modern conditions. In early English history waste was applied almost entirely to farm lands, 2 Bl. Com. p. 281, and, as in the case of *Pratt* v. *Brett,* 2 Madd. 62, the test applied was good husbandry. In that case an injunction was allowed to restrain a tenant from year to year from sowing the land with mustard seed. But in *Richards* v. *Torbert,* 3 Houst. (Del.) 172, it was held that ill husbandry was not necessarily waste, and a tenant, who was charged with tilling a lot three years in succession with Indian corn, was not held for waste. Under modern decisions the test by which waste is determined is whether there has been a diminution of the value of the inheritance which is a question of fact for the jury to decide. *Webster* v. *Webster,* 33 N. H. 18; *McGregor* v. *Brown,* 10 N. Y. 114; 1 WASHBURN, REAL PROP., Ed. 5, p. 153. The principal case applies this rule to those cases where there has been no physical injury to property, but still the inheritance has been prejudiced, and it is supported by the case of *Hersey* v. *Chapin et al.,* 162 Mass. 176, 38 N. E. 442, which held that an owner of land who is not in possession and has no right of possession may maintain an action for the injury to his reversion, if it appears that the use of the house as a smallpox hospital diminished its rental value. However, it was held in *Miller* v. *Forman,* 37 N. J. L. 55, a case where the premises were allowed to become filthy and were also used for purposes of prostitution, and in *Brown* v. *Broadway etc. Realty Co.,* 131 App. Div. 780, in which the roof of a leased building was used for advertising purposes, that as a matter of law such use did not amount to waste since no permanent injury to the inheritance resulted therefrom.

WILLS—CONSTRUCTION—ESTATE GRANTED—"WITHOUT ISSUE."—Testator devised his estate to his two sons, share and share alike, and in case of the death of either without issue, then the estate devised to him to go to the